

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Aug 06, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TERESA H.,

Plaintiff,

v.

KILOLO KIJAKAZI,  
ACTING COMMISSIONER OF  
SOCIAL SECURITY,<sup>1</sup>

Defendant.

No. 2:20-CV-00225-JTR

ORDER GRANTING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
REMANDING FOR ADDITIONAL  
PROCEEDINGS

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 19, 21. Attorney Chad Hatfield represents Teresa H. (Plaintiff); Special Assistant United States Attorney Diana Andsager represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

<sup>1</sup> Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

## JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits on August 25, 2017 alleging disability since July 12, 2017, due to anxiety, social anxiety, panic attacks, fibromyalgia, insomnia, arthritis, headaches, paranoia, thyroid issues, and osteoporosis. Tr. 78-79. The application was denied initially and upon reconsideration. Tr. 114-16, 118-20. Administrative Law Judge (ALJ) Jesse Shumway held a hearing on February 26, 2019, Tr. 37-77, and issued an unfavorable decision on March 22, 2019, Tr. 15-28. Plaintiff requested review of the ALJ's decision by the Appeals Council and the Appeals Council denied the request for review on April 19, 2020. Tr. 1-5. The ALJ's March 2019 decision is the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on June 17, 2020. ECF No. 1.

## STATEMENT OF FACTS

Plaintiff was born in 1965 and was 51 years old as of her alleged onset date. Tr. 26. She has some college education and received a certificate in dental assisting. Tr. 444. She has worked in the medical field, including being a unit coordinator in an emergency room for 13 years. Tr. 71-73, 223. She last worked in 2017 and testified that she left work due to her mental impairments, which were causing her to make mistakes, miss work, and have panic attacks while working. Tr. 56-59, 326. She has also struggled with symptoms from fibromyalgia, including wide-spread body pain and fatigue, which further exacerbate her mental health. Tr. 66-67.

## STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,

201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. § 404.1520(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show (1) the claimant can make an adjustment to other work; and (2) the claimant can perform specific jobs that exist in the national economy. *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make an

1 adjustment to other work in the national economy, the claimant will be found  
2 disabled. 20 C.F.R. § 404.1520(a)(4)(v).

### 3 ADMINISTRATIVE FINDINGS

4 On March 22, 2019, the ALJ issued a decision finding Plaintiff was not  
5 disabled as defined in the Social Security Act. Tr. 15-28.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
7 activity since the alleged onset date. Tr. 18.

8 At step two, the ALJ determined Plaintiff had the following severe  
9 impairments: fibromyalgia, lumbar and cervical degenerative disc disease, major  
10 depressive disorder, and panic disorder. *Id.*

11 At step three, the ALJ found Plaintiff did not have an impairment or  
12 combination of impairments that met or medically equaled the severity of one of  
13 the listed impairments. Tr. 17, 19-20.

14 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found  
15 she could perform a range of light work, with the following limitations:

16 she can frequently reach in all directions and frequently push and pull  
17 with the upper extremities; she can never climb ladders, ropes, or  
18 scaffolds; she can frequently balance; she can occasionally stoop,  
19 kneel, crouch, crawl, and climb ramps and stairs; she cannot be  
20 exposed to hazards (e.g., unprotected heights, moving mechanical  
21 parts); she is limited to simple routine work with a reasoning level of  
22 2 or less; she can have only occasional, superficial contact with the  
23 public and coworkers; she needs a routine, predictable work  
24 environment with no more than occasional changes; and she cannot  
25 perform fast-paced work.

26 Tr. 20.

27 At step four, the ALJ found Plaintiff was unable to perform her past relevant  
28 work as a unit clerk. Tr. 26.

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At step five the ALJ found that, considering Plaintiff's age, education, work experience and residual functional capacity, Plaintiff could perform jobs that existed in significant numbers in the national economy, specifically identifying the representative occupations of laundry worker, price marker, and mail clerk. Tr. 27.

The ALJ thus concluded Plaintiff was not under a disability within the meaning of the Social Security Act at any time from the alleged onset date through the date of the decision. Tr. 27-28.

### ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards.

Plaintiff contends the Commissioner erred by (1) improperly rejecting the opinion from Plaintiff's treating counselor Rebecca McManus; (2) improperly rejecting Plaintiff's subjective complaints; and (3) making inadequate step five findings.

### DISCUSSION

#### 1. Plaintiff's subjective allegations

Plaintiff contends the ALJ erred by improperly rejecting her subjective complaints. ECF No. 19 at 15-20.

It is the province of the ALJ to assess the claimant's allegations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying medical impairment, the ALJ may not discredit testimony as to the severity of an impairment merely because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.

1 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). “General findings are  
 2 insufficient: rather the ALJ must identify what testimony is not credible and what  
 3 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v.*  
 4 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

5 The ALJ concluded Plaintiff’s medically determinable impairments could  
 6 reasonably be expected to cause some of the alleged symptoms; however,  
 7 Plaintiff’s statements concerning the intensity, persistence and limiting effects of  
 8 those symptoms were not entirely consistent with the medical evidence and other  
 9 evidence in the record. Tr. 22. The ALJ found Plaintiff’s allegations were not  
 10 supported by the objective exam findings and test results, the course of treatment,  
 11 or Plaintiff’s activities, and found inconsistencies between Plaintiff’s allegations  
 12 and her own past reports to treatment providers. Tr. 22-24.

13 Plaintiff argues the ALJ took facts out of context, failed to identify any  
 14 activities that clearly contradicted Plaintiff’s testimony, and erred in requiring  
 15 objective evidence of a disease (fibromyalgia) that eludes such measurements. ECF  
 16 No. 19 at 15-20. Defendant argues the ALJ reasonably interpreted the objective  
 17 findings as unsupportive of Plaintiff’s complaints and legitimately considered the  
 18 course and type of treatment, along with Plaintiff’s activities and inconsistent  
 19 symptom reports. ECF No. 21 at 3-12.

20 The Court finds the ALJ’s rationale is not supported by substantial evidence.

### 21 **Activities**

22 A claimant’s activities may support an adverse credibility finding if the  
 23 claimant’s activities contradict her other testimony. *Orn v. Astrue*, 495 F.3d 625,  
 24 639 (9th Cir. 2007). However, the Court finds the ALJ did not identify any  
 25 activities that were inconsistent with Plaintiff’s reports. The ALJ found Plaintiff’s  
 26 attendance of aqua therapy at the YMCA was inconsistent with her reports of  
 27 extreme difficulty being in public and experiencing panic attacks when she leaves  
 28 the home or thinks about leaving. Tr. 24. The Court finds no inconsistency.

1 Plaintiff testified that she has difficulty leaving home, and has panic attacks  
2 roughly three times per week, but she has never alleged a complete inability to  
3 leave home. Tr. 60. She has consistently acknowledged being able to leave home  
4 occasionally for errands or to go to the pool two or three times per week, but also  
5 indicated she will sometimes leave if the parking lot is too crowded. Tr. 66, 215,  
6 394, 447, 506. To the extent the ALJ indicated that this activity is physically  
7 incompatible with Plaintiff's pain reports, the record indicates that Plaintiff was  
8 encouraged to engage in gentle, low-impact exercise for treatment of her  
9 fibromyalgia (Tr. 329, 465-66, 489), and she testified that her pool activity is not  
10 vigorous and primarily involves floating with a bit of arm and leg movement. Tr.  
11 65.

12 Defendant notes other activities that are arguably inconsistent with  
13 Plaintiff's reports, such as being able to cook, pay bills, remember medications,  
14 read the news, shop, and spend time with friends and family. ECF No. 21 at 5-6.  
15 However, the ALJ did not identify any of these activities as the basis for his  
16 finding; this therefore constitutes post hoc rationale that the Court will not  
17 consider. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The Court will  
18 "review only the reasons provided by the ALJ in the disability determination and  
19 may not affirm the ALJ on a ground upon which he did not rely.").

#### 20 **Course of treatment**

21 The ALJ found the course of treatment (including not trying fibromyalgia  
22 medications until September 2017) and the treating doctor's impression that  
23 Plaintiff was doing very well with respect to her fibromyalgia were inconsistent  
24 with Plaintiff's allegations regarding her fibromyalgia symptoms and limitations.  
25 Tr. 24. An ALJ may consider the type and effectiveness of treatment and whether a  
26 claimant complies with treatment in assessing the reliability of their reports. Social  
27 Security Ruling 16-3p; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

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1 However, the Court finds the facts identified by the ALJ do not constitute  
2 substantial evidence.

3 The ALJ's implication that Plaintiff's conditions were not as severe as  
4 alleged because she "had not even tried gabapentin or Lyrica until September  
5 2017" is not substantial evidence. Plaintiff's alleged onset date was July 2017, a  
6 mere two months earlier. The conversation about trying new medications for  
7 fibromyalgia was in the context of Plaintiff's present treatment with Duloxetine not  
8 being sufficient and Plaintiff having done some research about her condition. Tr.  
9 412. Her efforts to better treat her symptoms would seem to support, rather than  
10 detract from her allegations of pain and other symptoms.

11 The notation cited by the ALJ that Plaintiff's treating physician stated she  
12 had been doing very well regarding her fibromyalgia was also taken out of context.  
13 Doctor Kenny stated Plaintiff's fibromyalgia had been doing very well in the  
14 context of no longer working. Tr. 462. His assessment was: "Now that she is  
15 retired, I suspect that she will continue to improve." Tr. 465. Because the ALJ did  
16 not acknowledge the circumstances of the comment, this does not constitute  
17 substantial evidence.

18 To the extent the ALJ implied in his summary of the medical evidence that  
19 Plaintiff's inconsistent compliance with her medication and declination of a  
20 referral to physical therapy indicated her conditions were not as serious as alleged  
21 (Tr. 22), the Court finds these factors to constitute no more than a scintilla of  
22 evidence. It was only on one occasion that Plaintiff was noted to not be taking her  
23 Lyrica as prescribed, due to sedation. Tr. 397. Though she declined a referral to  
24 physical therapy at the end of October 2017 (Tr. 397), by mid-November she  
25 reconsidered and had started physical therapy. Tr. 402, 470.

### 26 **Inconsistent statements**

27 The ALJ found the record contained inconsistent statements, such as  
28 Plaintiff's testimony that she did not want to take opioids conflicting with her



1 request for hydrocodone, and her testimony regarding the frequency of her  
2 headaches not being reported to her treating providers. Tr. 23, 24. The Court finds  
3 no inconsistencies. The record regarding hydrocodone simply reflects Plaintiff's  
4 query to her provider in 2017 as to whether that would be something she could take  
5 as her present medications were causing drowsiness. Tr. 399. She was informed  
6 that narcotics are generally not recommended in the treatment of fibromyalgia and  
7 was encouraged to follow up with her rheumatologist to discuss other treatment  
8 options. Tr. 402. This is not inconsistent with her testimony in 2019 that she did  
9 not want to be on strong medications that affected her. Tr. 68.

10       Regarding headaches, the ALJ found that Plaintiff's testimony regarding  
11 headaches and migraines was not consistent with her pattern of reports to her  
12 providers, noting "nowhere in the record has she reported weekly migraines to a  
13 treating provider." Tr. 24. However, the record does contain Plaintiff's reports of  
14 daily or weekly migraines or headaches at different times. Tr. 442, 464, 470, 488.  
15 The ALJ is incorrect that the record does not contain reports consistent with her  
16 testimony. Therefore, this does not constitute a clear and convincing basis for  
17 disregarding her reports.

### 18       **Objective evidence**

19       The only other reason offered by the ALJ for discounting Plaintiff's  
20 subjective reports was the lack of support from the objective medical evidence. Tr.  
21 22-24. This alone is an insufficient reason to reject her statements. *Reddick v.*  
22 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Because none of the ALJ's other  
23 reasons for questioning Plaintiff's allegations meet the clear and convincing  
24 standard, unsupportive objective evidence is not a sufficient rationale.

25       Furthermore, the Court takes note that fibromyalgia is not a condition that  
26 generally lends itself to extensive objective findings. *See generally*, Social Security  
27 Ruling 12-2p; *Revels v. Berryhill*, 874 F.3d 648, 656-57 (9th Cir. 2017). It is not  
28 clear that the normal or unremarkable exam findings identified by the ALJ, such as

1 normal gait, intact strength and sensation, or mild imaging, have any bearing on  
 2 the severity of Plaintiff's fibromyalgia, and the ALJ cited to no medical source that  
 3 indicated as much.

4 Upon remand, the ALJ shall re-evaluate Plaintiff's statements and testimony.

5 **2. Counselor Rebecca McManus, LMCHA**

6 Plaintiff argues the ALJ improperly rejected the opinion from her treating  
 7 counselor, Ms. McManus. ECF No. 19 at 11-15.<sup>2</sup>

8 For claims filed on or after March 27, 2017, new regulations apply that  
 9 change the framework for how an ALJ must weigh medical opinion evidence.  
 10 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL  
 11 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 404.1520c. The new  
 12 regulations provide the ALJ will no longer give any specific evidentiary weight to  
 13 medical opinions or prior administrative medical findings, including those from  
 14 treating medical sources. 20 C.F.R. § 404.1520c(a). Instead, the ALJ will consider  
 15 the persuasiveness of each medical opinion and prior administrative medical  
 16 finding, regardless of whether the medical source is an Acceptable Medical Source.  
 17 20 C.F.R. § 404.1520c(c). The ALJ is required to consider multiple factors,  
 18 including supportability, consistency, the source's relationship with the claimant,  
 19 any specialization of the source, and other factors (such as the source's familiarity  
 20 with other evidence in the file or an understanding of Social Security's disability  
 21 program). *Id.* The regulations make clear that the supportability and consistency of  
 22 the opinion are the most important factors, and the ALJ must articulate how they  
 23 considered those factors in determining the persuasiveness of each medical opinion

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 25 <sup>2</sup> Plaintiff includes examining source Patrick Metoyer in the heading of her  
 26 argument and indicates that Dr. Metoyer's opinion supports Ms. McManus's  
 27 opinion, but does not specifically assign any error to the ALJ's treatment of Dr.  
 28 Metoyer's opinion. ECF No. 19 at 11-15.

1 or prior administrative medical finding. 20 C.F.R. § 404.1520a(b). The ALJ may  
2 explain how they considered the other factors, but is not required to do so, except  
3 in cases where two or more opinions are equally well-supported and consistent  
4 with the record. *Id.*

5 Supportability and consistency are further explained in the regulations:

6 (1) *Supportability*. The more relevant the objective medical evidence  
7 and supporting explanations presented by a medical source are to  
8 support his or her medical opinion(s) or prior administrative medical  
9 finding(s), the more persuasive the medical opinions or prior  
10 administrative medical finding(s) will be.

11 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
12 administrative medical finding(s) is with the evidence from other  
13 medical sources and nonmedical sources in the claim, the more  
14 persuasive the medical opinion(s) or prior administrative medical  
15 finding(s) will be.

16 20 C.F.R. § 404.1520c(c).

17 Plaintiff's treating counselor, Ms. McManus, completed a summary of her  
18 care of Plaintiff in February 2019. Tr. 512-14. In the summary, she recounted  
19 Plaintiff's reported symptoms and self-assessed functional limitations, then stated:  
20 "in my opinion, based on my observation and communication with Teresa, her  
21 self-assessment is accurate." Tr. 514.

22 The ALJ stated: "I do not find this statement persuasive as a medical opinion  
23 given that it merely parrots the claimant's own report and brings no apparent  
24 professional judgment to bear." Tr. 26.

25 Plaintiff argues this discussion was insufficient, noting the ALJ may not  
26 merely assume that a provider's opinion was based solely on self-reports and  
27 arguing that the opinion is supported by Ms. McManus's treatment records and  
28 other evidence in the file. ECF No. 19 at 12-15. Defendant argues the ALJ  
reasonably found the opinion was not supported by clinical findings or professional

1 judgments and was inconsistent with other opinion evidence in the record. ECF  
2 No. 21 at 15-19.

3 As this claim is being remanded for reconsideration of Plaintiff's subjective  
4 reports, the ALJ shall also reconsider the opinion evidence, discussing the factors  
5 of supportability and consistency in assessing the persuasiveness of the opinions.

6 **3. Step five findings**

7 Plaintiff argues that the ALJ erred in his step five determination because the  
8 testimony of the vocational expert was premised on an incomplete hypothetical  
9 stemming from an inaccurate residual functional capacity determination. ECF No.  
10 19 at 21. Considering the case is being remanded for the ALJ to properly address  
11 Plaintiff's subjective symptom testimony, the ALJ will be required to make  
12 findings on all of the steps of the sequential evaluation process, and consult a  
13 vocational expert as needed.

14 **CONCLUSION**

15 Plaintiff argues the decision should be reversed and remanded for the  
16 payment of benefits. The Court has the discretion to remand the case for additional  
17 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292  
18 (9th Cir. 1996). The Court may award benefits if the record is fully developed and  
19 further administrative proceedings would serve no useful purpose. *Id.* Remand is  
20 appropriate when additional administrative proceedings could remedy defects.  
21 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court  
22 finds that further development is necessary for a proper determination to be made.

23 The ALJ's decision with respect to Plaintiff's subjective complaints is not  
24 supported by substantial evidence. On remand, the ALJ shall reevaluate Plaintiff's  
25 subjective complaints and the record as a whole and complete the five-step  
26 process.

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1 Accordingly, **IT IS ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is  
3 **GRANTED IN PART.**

4 2. Defendant's Motion for Summary Judgment, **ECF No. 21**, is  
5 **DENIED.**

6 3. The matter is **REMANDED** to the Commissioner for additional  
7 proceedings consistent with this Order.

8 4. An application for attorney fees may be filed by separate motion.

9 The District Court Executive is directed to file this Order and provide a copy  
10 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and  
11 the file shall be **CLOSED.**

12 **IT IS SO ORDERED.**

13 DATED August 6, 2021.



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A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE